

## **Bills Committee on the Employment (Amendment) Bill 2014**

### **The Government's response to issues raised by the Bills Committee at its meetings held on 10 and 12 May 2014**

This paper responds to the issues raised by the Bills Committee on the Employment (Amendment) Bill 2014 ("the Bill") at its meetings held on 10 and 12 May 2014.

#### **Payment in lieu of statutory paternity leave (PL)**

2. A Member enquired whether the requirements under the Bill for an employee to give the stipulated advance notice to his employer for entitlement to statutory PL, and to provide his employer with the required documentary proof for entitlement to PL pay, would create a loophole for employers to be exonerated from the liability to grant PL to the employee if the latter had agreed to refrain from giving the required notice or documentary proof to the employer in exchange for payment in lieu of taking PL.

3. It is the policy intent of the Bill to make three days' paid PL a statutory benefit. Unless a male employee notifies his employer, the employer would not normally know that the male employee will or has become a father. Furthermore, given that the exact date(s) of PL to be taken by individual employees may hinge on various factors such as the family circumstances of the employee concerned and the physical conditions of the mother and/or the newborn child, and having regard to the need to balance the interests of employers and employees, the Bill proposes to allow the employee to take PL on dates of his choice within a specified time frame, on the condition that he has given advance notice to his employer in accordance with the proposed new section 15E<sup>1</sup>. For

---

<sup>1</sup> Under the proposed new section 15E, an employee who intends to take PL must –

- (i) notify his employer:
  - (a) at least 3 months before the expected date of delivery of the child; and
  - (b) at least 2 days before the day on which PL is to be taken; or
- (ii) (if the employee fails to give the 3 months' notice to his employer) notify his employer at least 5 days before the day on which PL is to be taken.

If the employer so requests, the employee must also provide his employer with a written

payment of PL, the Bill further proposes that a qualified employee has to provide the employer with document(s) in support of the claimed father-child relationship in order for him to be entitled to such pay. The proposed notification requirement and provision of documentary proof are critical factors in establishing an employee's respective entitlements to PL and PL pay and aims to strike a fine balance to protect the interests of both employees and employers.

4. The Bill seeks to provide working fathers with a right to take PL. If the employee meets the criteria stipulated in the Bill and has given the required advance notice to his employer in accordance with the relevant provisions, the right of the employee to take PL is established. With the right of the employee having established, the employer will contravene the proposed new section 15L if he/she fails to grant PL to the employee though payment in lieu of PL is made to the employee. Even if there is an agreement between the employer and the employee about making payment in lieu of PL, the employer still commits an offence if he/she denies an employee the benefit of taking PL in the same way like employees' entitlement to statutory holidays. However, if owing to personal reasons, an employee has chosen not to exercise his right to take PL, the law will not oblige him to notify his employer that he is going to have a child and/or to take such leave. On the basis of the above, the Government is of the view that the Bill will not provide a means for employers to curtail eligible employees' right to PL by making payment in lieu.

### **Employees not taking care of the mother and the child during PL**

5. A Member queried the need to grant PL benefits to an employee whose spouse/partner had given birth in a place outside Hong Kong but the employee had not left Hong Kong in any of the 3 days of PL granted for taking care of the mother and the newborn. Another Member queried whether an employee was in breach of the law if he worked for another employer during PL.

6. The Government considers that imposing a requirement on how

---

statement signed by him stating the child's mother's name, the expected date of delivery of the child or (if available) actual date of delivery, and that he is the child's father.

the working father should take care of the mother and the child would not be practicable. It would likely give rise to endless arguments and labour disputes. The Government thus considers that there is no need to specify in the Bill whether the employee has indeed discharged his family responsibilities towards the mother and the child when taking PL.

7. The Employment Ordinance (EO) does not restrain an employee from taking up concurrent employment or restrain the personal activities of the employee during his/her rest days / leave / statutory holidays. Whether an employer permits an employee to take up other jobs while under his/her employ is a matter to be agreed between the employer and the employee under their employment contract. The introduction of PL would not change this established practice. If an individual employer has genuine reasons against an employee's taking up additional employment while under his/her employ, it is a matter for the employer and the employee to specify such restriction under the employment contract concerned.

### **Prohibition against termination of employment**

8. Some Members enquired why there were no provisions under the Bill similar to those prohibiting the dismissal of pregnant employees in EO to protect employees taking or intending to take PL from dismissal and, in the case of dismissal before the taking of PL, to require the employer to grant the employee three days' PL pay as compensation.

9. At present, it is an offence for an employer to dismiss a pregnant employee from the date on which she is confirmed pregnant as evidenced by a medical certificate, to the date on which she is due to return to work upon the expiry of maternity leave (ML) (except for summary dismissal due to the employee's serious misconduct etc.<sup>2</sup>). If the employer

---

<sup>2</sup> Under section 9 of EO, an employer may terminate a contract of employment without notice or payment in lieu –

- (a) if an employee, in relation to his employment-
  - (i) wilfully disobeys a lawful and reasonable order;
  - (ii) misconducts himself, such conduct being inconsistent with the due and faithful discharge of his duties;
  - (iii) is guilty of fraud or dishonesty; or
  - (iv) is habitually neglectful in his duties; or
- (b) on any other ground on which he would be entitled to terminate the contract without notice at common law.

dismisses a pregnant employee unlawfully, apart from the possibility of being prosecuted, he/she is further required to pay the pregnant employee wages in lieu of notice, a further sum equivalent to one month's wages and 10 weeks' ML pay, if, but for the dismissal, she would have been entitled to such payment. The duration in which a female employee is afforded maternity protection may in most cases last for several months, possibly spanning from the confirmation of pregnancy to six or eight weeks after the actual delivery.

10. The restriction on dismissal in relation to pregnancy or confinement under EO is imposed having regard to the special circumstances of a pregnant employee who may be hindered by her physical conditions from performing certain work during her pregnancy and her need to take leave for medical examinations in relation to her pregnancy. Besides, owing to the need to recover from infirmity shortly after giving birth and to provide full-time primary care for the child during the early period of its life, it would be more difficult for a pregnant woman or a woman having given birth to seek and start a new employment before she has fully recovered from the physical act of child-bearing. It can therefore be seen that the existing employment protection for a female employee is in essence a form of maternity protection with the aim of safeguarding her against dismissal owing to her pregnancy or confinement but not for her taking ML alone. Furthermore, it should be noted that unlawful dismissal of a pregnant employee and that of an employee who is on ML is a prosecutable offence, with which an employer cannot get away by simply compensating the female employee with pay.

11. Notwithstanding the pregnancy or confinement of his spouse/partner, the male employee's own physical condition would in general not differ owing to the pregnancy or confinement of his wife or partner. Without the physical constraints of a pregnant woman or a woman who has given birth, he would also not be confronted with the same difficulties in finding alternative employment faced by the aforesaid woman should he be dismissed. As such, the prospective father or father of a newborn child would not have any special circumstances that would set him so much apart from any other employees as to warrant the same protection against dismissal as that afforded to a pregnant employee.

Besides, given that the proposed duration of PL is three days, affording employment protection and granting monetary compensation to an employee in relation to the taking of PL similar to that under the maternity protection provisions in EO would appear to be disproportional. Furthermore, unlike maternity cases, the father-child relationship can hardly be established before the birth of the child and the issue of the birth certificate. There will be immense implementation problems for employers in affording additional employment protection to a male employee who merely claims to be expecting a child, especially those births outside marriage cases. It may also bring about responsibilities which are both unreasonable and disproportional to employers.

12. Members may wish to note that in coming to a consensus on legislating for PL, the Labour Advisory Board agreed that, *where appropriate*, the relevant requirements and details of PL should be aligned with those applicable to ML under EO for the purpose of reasonableness and consistency with the existing law. For the reasons stated in paragraphs 10 and 11 above, the Government considers that it would not be appropriate to extend the employment protection in relation to pregnancy and confinement to employees taking or intending to take PL.

### **Inclusion of PL in the notice period for termination of contract**

13. In connection with the Government's written response to the Legal Service Division of the Legislative Council dated 8 May 2014 under LC Paper No. CB(2)1480/13-14(05), some Members expressed concern that if there was no prohibition on the inclusion of PL in the length of notice required to terminate a contract of employment, an employee who was dismissed by way of notice after having notified his employer of the dates on which he intended to take PL would lose out if the employer includes his PL as part of the notice period, hence shortening the actual notice period which the employer was required to give. To tackle this problem, it was suggested that in the event of a termination of contract where notice instead of payment in lieu was given, the three days' PL should not be allowed to be included in the notice period, be the termination initiated by the employer or the employee.

14. Denying the inclusion of PL in the length of notice to terminate a contract would not always work to the advantage of the employee. Other than the scenario mentioned in paragraph 13 above, an employee who tenders resignation may wish to take PL during the notice period and have PL included as part of the notice period. Under the scenario where an employee needs to take PL and the notice period is not short, say, one month or more, then the employee may have difficulty in meeting his family needs if he is not allowed to take PL during the whole notice period. It should be noted that under the existing EO, there is no restriction on the inclusion of holidays in the notice period required to terminate an employment contract.

### **Notification requirement**

15. A Member queried whether it is reasonable to require an employee to notify his employer two days before the actual day of his taking PL as the employee might need to take leave immediately when he learnt that the newborn was about to be delivered, the time of which was unpredictable in most cases. On the other hand, some Members expressed concerns that employers, small and medium enterprises in particular, could have operational difficulties in releasing their employees for PL upon short notice.

16. As stated in paragraph 3 above, the Bill proposes that an employee who intends to take PL must give advance notice to his employer. The purpose of the notification requirement relating to PL is to enable the employer to have early knowledge of the employee's intention to take PL, thus facilitating manpower deployment by the employer where necessary during the employee's PL. The Bill does not prohibit an employer from waiving the notification requirement if circumstances warrant and it is operationally feasible to do so. In formulating the proposed notification requirements, the Government has taken a pragmatic approach to balance the interests of employers and employees.